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No. 214

In the Supreme Court of the United States

OCTOBER TERM, 1942

STATE OF MICHIGAN, JOHN J. O'HARA, AUDITOR GENERAL FOR THE STATE OF MICHIGAN, COUNTY OF WAYNE, A CORPORATE BODY POLITIC, JACOB P. SUMERACKI, TREASURER FOR THE COUNTY OF WAYNE, CITY OF DETROIT, A MUNICIPAL CORPORATION, AND ALBERT E. COBO, TREASURER OF THE CITY OF DETROIT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court delivered no opinion. Its findings of fact and conclusions of law (R. 229–243) are reported at 41 F. Supp. 41. The opinion of the circuit court of appeals (R. 292–296) is reported at 127 F. (2d) 64.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 8, 1942 (R. 290). The petition for certiorari was filed on July 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the lien of the United States for federal estate taxes upon the real estate of the decedent, although unrecorded, is superior to liens for unpaid local real estate taxes which attached subsequent to the lien for the federal tax.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 9–11.

STATEMENT

The facts were stipulated (R. 100–130–f) and found by the district court as stipulated (R. 229–240). They may be summarized as follows:

John P. Paul, a resident of Detroit, Michigan, died intestate on May 5, 1926 (R. 229). On July 5, 1927, his widow, Lena Paul, filed a federal estate tax return for the estate of her husband and paid the tax reflected thereon (R. 229). Subsequently the Commissioner of Internal Revenue duly assessed a deficiency, together with interest, against the estate (R. 230). Though demands were made by the Collector, no part of the deficiency or interest has been paid (R. 230).

At the time of his death, John P. Paul and his wife, Lena Paul, owned as tenants by the entirety some fifty parcels of Detroit real estate (R. 230–231). Later some of the parcels were mortgaged to secure loans made by the Detroit Bank and others (R. 235–239). Upon most of the unmortgaged parcels, the local real estate taxes due to the State of Michigan, the County of Wayne and the City of Detroit were not paid for the years following 1929 or 1930 (R. 115–130). The estate of John P. Paul was not probated and there were no assets other than the real estate from which the federal estate tax could be collected (R. 239).

On May 4, 1936, the United States instituted an action to foreclose its lien upon the real estate for the unpaid federal taxes and interest (R. 1–47). The petitioners were joined as parties to the action (R. 2) and each of them filed an answer asserting that its lien for unpaid local real estate taxes was superior to the lien of the United States (R. 63–87, 88, 98–99). The mortgagees also claimed superiority for their liens (R. 49–62). The district court decided that since the lien of the United States for unpaid federal estate taxes was prior in time, it was superior in right to the liens for the unpaid real estate taxes, and to the liens of the subsequent mortgagees (R. 241). Upon appeal this decision was affirmed by the circuit court of appeals (R. 292–296).

The Detroit Bank has filed a petition for certiorari seeking review of the judgment of the circuit

court of appeals insofar as it relates to the relative priority between the mortgage liens and the federal estate tax lien. *The Detroit Bank* v. *United States*, No. 156, present Term.

ARGUMENT

Under Section 315 (a) of the Revenue Act of 1926 the estate tax became "a lien for ten years upon the gross estate of the decedent," including the real property held by him by the entirety. The lien attached on May 5, 1926, when the decedent died. *Rosenberg* v. *McLaughlin*, 66 F. (2d) 271 (C. C. A. 9th); *United States* v. *Ayer*, 12 F. (2d) 194 (C. C. A. 1st). The earliest of the liens for unpaid local real estate taxes did not attach before 1929. The district court and the circuit court of appeals, therefore, were correct in deciding that the federal estate tax lien, being prior in time, was superior in right to the lien of the petitioners. Cf. *Rankin* v. *Scott*, 12 Wheat. 177, 179.

1. In Part I of their supporting brief, petitioners urge that respondent's lien is void because notice of it was not filed in accordance with Section 3746 of the Compiled Laws of Michigan. This is the chief contention made by the Detroit Bank in its petition for a writ of certiorari to review the judgment below. In our brief in opposition to that petition (No. 156, present Term) we discussed the applicable statutes and pointed out that the lien did not require filing or recordation because it arose under Section 315 (a) of the Reve-

nue Act of 1926 and not under Section 3186 of the Revised Statutes.

There is a second answer to the contention as it is made by these petitioners. Section 3186 provides not that the failure to file notice of the lien in the proper office renders the lien invalid, but only that it "shall not be valid as against any *mortgagee, purchaser,* or *judgment creditor.*"[1] Since petitioners are none of these, the fact that the notice was not recorded is of no consequence here. Insofar as the Michigan statute (1 Compiled Laws of Michigan (1929) § 3746) purports to provide that the lien cannot be acquired unless notice is recorded, it exceeds the authority given by Congress and is, therefore, ineffectual as an unwarranted interference with the federal taxing power. *United States* v. *Snyder,* 149 U. S. 210.

2. Petitioners also contend (Br., Pts. II and III) that their liens are superior to the lien of the United States because they are made so by the laws of Michigan. The court below rejected this contention on the ground, *inter alia,* that state law did not give the real estate tax liens priority. Sound reason supports that conclusion. The state statute provides only that the taxes shall become a lien upon real estate at once when assessed and shall continue as such until payment (6 Michigan Stats. Ann., 1935, Sec. 7.81). No express provision makes the tax lien a first lien upon the property

[1] Italics added.

but the lien attaches to all the land and therefore to the interest of a mortgagee or other lienor. See *Harrington* v. *Hilliard,* 27 Mich. 271; *Horton* v. *Ingersoll and Saunders,* 13 Mich. 409; *Noeker* v. *Howry,* 119 Mich. 626. Doubtless this theory explains the phraseology of the next sentence in the statute, which provides—

> And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property * * *.

But the theory cannot apply when the United States is lienor because its property, i. e., its interest in the real estate, is not taxable by a state. And in the absence of an express provision it connot be inferred that the state intended to make its tax lien superior to federal charges earlier in point of time. Compare *Eagle Point Irr. District* v. *Cowden,* 137 Ore. 121; *Scandinavian American Bank* v. *King County,* 92 Wash. 650.

But even if the Michigan statute does attempt to make the lien for state real estate taxes superior to the federal lien which was prior in time, the statute would not be effective to displace the lien of the United States. When both the United States and a State declare their respective tax claims to be first charges, the federal lien is superior to any state lien, except possibly a prior specific, perfected lien.[2] *Spokane County* v. *United States,* 279 U. S.

[2] The question of priority between federal charges and a prior specific state lien has always been expressly reserved in the decisions of the Court.

80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480. Cf. *United States* v. *Snyder, supra*; *Florida* v. *Mellon*, 273 U. S. 12.

There can be no doubt that the United States has provided that its lien shall be prior to a state lien subsequently attached. In the instant case the lien arose under Section 315 (a) of the Revenue Act of 1926 (see pp. 4–5, *supra*). It was not an inchoate right or floating charge requiring further steps to perfect it. It had, by the terms of that section, attached to the gross estate as the property giving rise to the tax, just as the state lien attached to the property against which the state tax was levied. Section 315 (a), therefore, must be interpreted in the light of the general rule that a lien prior in time is prior in right (*Rankin* v. *Scott, supra*), and it cannot be supposed to grant the states the right to interfere to collect state taxes assessed subsequent to perfection of the lien.

The result would be the same even if it were assumed that the lien were based upon Section 3186 of the Revised Statutes, as amended. That section specifically provides priority for certain liens subsequent in point of time, for example, for the lien of securities issued for a full consideration, but it does not authorize the states to impose prior charges hindering the collection of federal revenues. The mention of one exception is persuasive evidence that Congress intended the lien of the federal taxes to take precedence over liens subsequently accrued without other exceptions. The

Circuit Court of Appeals for the Fourth Circuit adopted this view in *United States* v. *City of Greenville,* 118 F. (2d) 963. The question has not arisen in other circuits.[3]

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1942.

[3] *United States* v. *City of Greenville, supra,* reversed *United States v. Woodside,* 34 F. Supp. 281 (W. D. S. C.) and expressly overruled *City of Winston-Salem* v. *Powell Paving Co.,* 7 F. Supp. 424 (M. D. N. C.). Earlier the Supreme Court of West Virginia had followed the latter decision in *Berrymont Land Co.* v. *Davis Creek Land & Coal Co.,* 119 W. Va. 186, and held as a matter of the interpretation of Section 3186 that a state which foreclosed its tax lien and sold land for taxes gave a title good against a lien arising under Section 3186 prior to the state tax lien. Since the lien in this case arises under Section 315 (a), that decision does not conflict with the holding below. Moreover, it seems reasonable to believe that the Supreme Court of West Virginia, which sits in a state within the Fourth Circuit, would now follow *United States* v. *City of Greenville, supra.*

APPENDIX

Revised Statutes:

SEC. 3186 (as amended by Section 613 of the Revenue Act of 1928, c. 852, 45 Stat. 791):

(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice;

* * * * *

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the

deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (U. S. C., Title 31, Sec. 191.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *

* * * * *

SEC. 315. (a) Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *

Michigan Statutes Annotated, 1935, Vol. 6:

SEC. 7.81. *Property taxes; lien after December 1; precedence of lien, exception, city personal property tax lien.* SEC. 40. The taxes thus assessed shall become at once a debt due to the township, city, village and county from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first [1st] day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes hereafter levied or assessed shall also be a first [1st] lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first [1st] day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city, and so remain until paid, * * *.

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